BEFORE THE NATIONAL LABOR RELATIONS BOARD Region 5

ONSITE NEWS

And CASES: 05-CA-076019 & 5-RD-001500

UNITEHERE Local 7

EXCEPTION TO ADMINSTRATIVE LAW JUDGE DECISION

COMES NOW the Respondent, Onsite News, and files the following Exception to the Decision of Judge Michael A. Rosas in Cases 05-CA-076019 & 5-RD-001500, and the Supplemental Decision issued thereto.

Respondent takes exception to the factual finding set forth at Page 5, Line 5, where Judge Rosas states as follows:

Perry concluded the conversation by noting that he would rather be lenient in such situations, but would have to strictly apply the rules if the Union remained as the employees bargaining representative.

Respondent takes further exception to the factual finding set forth at Page 5, Line 14, where Judge Rosas states as follows:

Perry responded that, "if the Union came in, he would have to start going by the book. He said he had been lenient with employees, but if the Union came in, then he would have to start going by the book."

Respondent takes further exception to the factual and legal finding set forth at Page 5, Line 34, where Judge Rosas states as follows:

Perry informed Wheeler and Whitehead during February, the month prior to the election, that he would cease being lenient and have to be stricter if the Union continued serving as the bargaining unit's labor representative. These comment, which were made during the month leading up to the union decertification election, were not predictions of the effects of unionization based on objective fact; nor did they address consequences beyond the Company's control.

Respondent takes further exception to the factual finding set forth at Page 6, Line 14, where Judge Rosas states as follows:

Accordingly, Perry's statements of Wheeler and Whitehead constituted unlawful threats to enforce tardiness rules more strictly if the Company remained unionized.

Respondent takes further exception to the factual finding set forth at Page 6, Line 28, where Judge Rosas states as follows:

Perry's remarks are distinguishable from situations where an employer conveys relatively innocuous statements of its intent to adhere to specific provisions in a collective bargaining agreement.

Respondent takes exception to the factual finding set forth at Page 6, Line 48, where Judge Rosas states as follows:

As previously found, Perry informed at least two employees, Wheeler and Whitehead, in February that he would be less flexible and forced to be stricter in enforcing Company rules if the Union continued to serve as the bargaining unit's labor representative. In addition to constituting unfair labor practices, Perry's remarks amounted to conduct that destroyed the laboratory conditions during the critical period and should be sustained.

Respondent takes further exception to the factual and legal finding set forth at Page 7, Line 5 of the Decision, where in Judge Rosas states as follows:

Perry's remarks to two people in different scenarios – one a Union supporter, while the other was opposed to the Union – during the month leading up to the election, strongly suggests that his comments were not limited to those employees. Under the circumstances, the May 9 election must be set aside and a second election ordered.

Respondent takes further exception to the factual and legal findings set forth at Page 7, Line 25, where Judge Rosas states as follows:

- 4. By threatening employees with stricter enforcement of work rules if they supported the Union, the Company violated Section 8(a)(1) of the Act.
- 5. The aforementioned unlawful conduct engaged in by the Company constitutes unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 6. By the foregoing violations of the Act, which occurred during the critical period before the May 9 election, and by the conduct cited by the Union in Objection 1, the Company has prevented the holding of a fair election, and such conduct warrants setting aside said election in Case 5-RD-001500.

ARUGMENT

There is **no evidence** to support these conclusions. In fact, the witness testimony presented at the hearing in this matter **directly and specifically contradicts these findings**. Further, Judge Rosas explicitly bases his most critical findings on an assumption **not** in evidence ("strongly suggests"), rather than on the testimony actually presented.

Testimony of London Perry

The General Counsel opened his case by calling Mr. London Perry as his first witness. Mr. Perry is the General Manager of Onsite News, with overall responsibility for all operations of the Employer. After some introductory questioning related Mr. Perry's position and the Employer's overall business, the General Counsel moved on to the heart of the matter, a meeting in February of 2012 between Mr. Perry and Anthony Wheeler, an employee whose allegations form the basis for the unfair labor practice charge comprising Case 5-CA-076019. The purpose of this meeting was to address Mr. Wheeler's continued, problematic tardiness. (Trial transcript, p. 16, line 21.) Mr. Wheeler had filed a grievance, alleging that his hours had been improperly reduced, and Mr. Perry explained that the reduction in hours was mandated by business considerations and Mr. Wheeler's own conduct, specifically his repeated tardiness. (Trial transcript, p. 17-19.) At the meeting, Mr. Perry explained to Mr. Wheeler that under Union seniority rules, Mr. Perry would be unable to show lenience to Mr. Wheeler regarding his tardiness, since that would constitute favoritism, and would give rise to a grievance from the Union. (Trial transcript, pp. 23-24.) Mr. Perry testified that he stated this only to Kevin Wheeler, to no other employees, and only in reference to Mr. Wheeler's grievance. (Trial transcript, p. 27, line 15, and p. 28, line 11.)

Mr. Wheeler specifically and unequivocally testified that he **did not ever** tell any Mr. Wheeler, or **any other employee** that he would more strictly enforce the rules if the Union were to win the decertification election.

- Q: Did you ever tell any employee that you would more strictly enforce the rules if the Union were to win the decertification vote?
- A: No, absolutely not.
- Q: Did you tell Mr. Wheeler that you would more strictly enforce the rules if the Union were to win the decertification vote?
- A: Absolutely not.

Q: Did you ever tell any employees of Onsite that were the Union to win the decertification vote. that in general workplace rules would be more strictly enforced?

A: No.

(Trial transcript, pp. 35-36.)

Having failed to elicit testimony to support the case from Mr. Perry, the General Counsel then read into the record certain portions of two affidavits, signed by Mr. Perry, that had been filed in defense of the unfair labor charge. Specifically, the General Counsel read into the record an excerpt from a April 10, 2012 affidavit and one from a March 28, 2012 affidavit, which excerpts the General Counsel apparently contends constitute some sort of admission. But since the election occurred on March 9, both affidavits post-date the election, and in neither of these excerpts was there any indication that the statements were made prior to the March 9, 2012 election. In fact, in both of the specific excerpts read into the record by the General Counsel it is clear that Mr. Perry is speaking generally about his conversations with employees about the Union, and there is no indication that these were statements made because of or in relation to the election. (Trial transcript, pp.32-33.)

Testimony of Anthony Wheeler

Having failed elicit any testimony in support of the Objection from Mr. Perry, the General Counsel then called Anthony Wheeler to the stand. Initially, on direct examination, Mr. Wheeler testified that London Perry told Mr. Wheeler that if he were to file a grievance with the Union, Mr. Perry would be forced to strictly enforce the rules, but that Mr. Perry would "rather be lenient" with Mr. Wheeler so that Mr. Wheeler wouldn't lose his job. (Trial transcript, p. 46-47.) However, under cross-examination, Mr. Wheeler completely reversed his testimony:

Q: So he never said that he would be lenient in ways so that you wouldn't lose your job or any word to that effect. He didn't say that?

Judge Rosas: Yes or no.

The Witness: No, he didn't.

(Trial transcript, pp. 57-58.)

Further, Mr. Wheeler **repeatedly** refuted the allegations of the Objection and the Complaint:

Q: ... At this meeting, did Mr. Perry threaten employees with stricter enforcement of its rules, of its work rules, if the employees voted for the Union?

A: No, he did not.

(Trial transcript p. 58, lines 16-20.)

. . .

Q: All right. Did you ever tell any employees of Onsite, at any time after this, did you ever tell them at any time that employees would face stricter enforcement of the work rules if the employees voted for the Union?

A: No, I didn't.

(Trial transcript, p. 60, lines 16-20.)

Testimony of Monae Whitehead

Judge Rosas appears to rely most especially on the testimony of the final witness called by the General Counsel, Monae Whitehead. Ms. Whitehead testified that she had a conversation with Mr. Perry sometime in February of 2012, in which she expressed her disgust with the Union:

Q: How did it begin?

A: I said that I was tired of the Union and I didn't want them knocking on my door anymore. And that I didn't want the Union. And I brought the conversation up. And I started talking about the conversation.

Q: And once you made those statements, how if at all did Mr. Perry respond?

A: Just that, that Onsite would have to go by the book.

Q: Do you recall if that's all he said?

A: That's it.

(Trial transcript pp. 69-70.)

The General Counsel attempted to elicit testimony from Ms. Whitehead regarding the allegation that Mr. Perry discussed 'leniency' but the General Counsel failed to do so:

Q: During the conversation with Mr. Perry, you testified that you had initiated a conversation with Mr. Perry regarding the Union. Do you recall any discussion about leniency during that conversation?

A: Leniency?

Q: Yes.

A: No.

(Trial transcript, p.71.)

Having been thwarted by his own witness once again, the General Counsel then read into the record a portion of a March 28, 2012 affidavit signed by Ms. Whitehead, which stated in part:

On or about mid-February 2012, **I do not recall the exact date**, I had a one-on-one conversation with Mr. Perry in the hallway of BWI Marshall Airport. Perry told me during this conversation that if the Union came in, he would have to start going by the book.

(Trial transcript p. 76, line 21-25.) (emphasis added)

Even assuming this affidavit accurately reflects a conversation – a conversation that Ms. Whitehead specifically denies any recollection of – there is no evidence that this conversation occurred before the March 9, 2012 election, because even in the affidavit, Ms. Whitehead stated that she did not recall the exact date.

In any case, under cross-examination, Ms. Whitehead, like Mr. Wheeler, specifically refuted the allegations of the Objection:

Q: Ms. Whitehead, London Perry never, at any time, threatened you with more stricter enforcement of the work rules if you vote for the Union, did he?

A: No. Not – no.

Q: Did any supervisor from Onsite threaten you with more stricter enforcement of the work rules if you voted for the Union?

A: No.

Q: No. Did anyone threaten you with stricter enforcement of the work rules if you voted for the Union?

A: No. They didn't.

Testimony of London Perry

The General Counsel rested their case. Onsite then called Mr. Perry back to the stand, where he **again** specifically denied the allegations of the Objection and the Complaint:

Q:..I'd like to direct your attention first to the February meeting that was held with Mr. Kevin Wheeler. At this meeting, it is alleged – Mr. Wheeler alleges that you said if you go through the Union, I would have to be more strict. Did you ever say that?

A: Absolutely not.

Q: Mr. Wheeler alleges that you said that you could be lenient in other ways that would not cause Mr. Wheeler to lose his job. Did you ever say that?

A: No, I did not.

(Trial transcript, pp. 83-84.)

. . .

Q: Okay Did you tell any employees that there would be stricter enforcement of the work rules if they voted for the Union?

A: Absolutely not.

Q: At any time?

A: No.

Q: Never?

A: No.

(Trial transcript, p. 88.)

Since no witnesses provided any testimony that supported the allegations of the Objection and the Complaint, and, in fact, all witnesses specifically refuted those allegation, as best as can be determined, it appears that Judge Rosas is essentially saying "please ignore the testimony of the General Counsel's own witnesses" and instead bases his conclusions solely on the excerpts of the affidavits read into the record. But, as stated previously, there is no evidence that these excerpts reflect statements that occurred before the March 9, 2012 election – in the case of Mr. Perry's affidavits, the excerpts contain no dates, and in the case of Ms. Whitehead's affidavit, the excerpt contains a specific statement that Ms. Whitehead did not remember when the conversation occurred. An even if the statements in the affidavits were made before the election, there is no evidence that these statements could be reasonably construed as any sort of threat related to the election – in fact, **all** witnesses specifically denied that Mr. Perry made such a threat.

The case of *Miller Industries Towing Equipment et al.*, 342 NLRB 1074 (2004), is most applicable to the present case. In Miller, a supervisor told a group of employees that if a union were present, the employer's ability to modify overtime policies to accommodate the needs of specific employees would be more difficult. The administrative law judge in the *Miller* case initially found that this to be a "threat to more strictly enforce" the work rules, and thus a violation of the National Labor Relations Act. But, the Board

reversed and found that the supervisor was merely making a factual point – that, "with a union, agreed-upon contractual terms govern the workplace" and the employer would not have discretion to make policy changes at will. 342 NLRB at 1077. We have nearly the identical situation in the present case. The evidence shows that, at most, Mr. Perry may have explained to Mr. Wheeler and perhaps Ms. Whitehead, that while subject to a collective bargaining agreement, he would not be free to make policy changes and that the rules of the contract would govern.

But Miller provides another, and even more important, quideline for the present case. While the Board in Miller did not find the supervisor's statements relating to overtime to be violations of the Act, the administrative law judge did find (and the Board did affirm) that a different supervisor had threatened employees with plant closure, stricter enforcement of plant rules, and layoffs if the employees voted for a union. But even with this finding, the judge found that, while this conduct was a violation of the Act, the misconduct did not support an objection to the election, because of the "isolated nature of the misconduct and the number of employees affected – the judge concluded that the conduct could **not have affected** the results of the election. 342 NLRB at 1090. Even given the most generous and expansive view of the evidence presented by the General Counsel and the Union, the fact remains that the decertification vote in the present case was 15 to 7, against the Union. The General Counsel and the Union presented only two witnesses who claimed to have heard Mr. Perry make any statements that could be construed as a basis for an objection, and two votes would simply not be enough to change the outcome of the election. (Ignoring, for the sake of the argument, the fact that these very same witnesses specifically denied the claims of the objection to begin with.) Judge Rosas appears to acknowledge the fact that the claims of only two witnesses would be insufficient to support voiding the election results, since he, sua sponte, assumes, without any support in evidence, that this testimony "strongly suggests" that Mr. Perry made statement to other employees. Judge Rosas makes this assumption, even though all witnesses, including Mr. Perry, **specifically denied** any such statements occurred.

CONCLUSION

The unrefuted testimony of all witnesses **directly contradicts** the conclusions of Judge Rosas. But even if the conclusions were true, it simply would not matter, because the claimed misconduct would not give

be sufficient to	support an	objection,	and c	ould not,	as a	simple	mathema	tical fa	ıct, alter	the	outcome	e of
the election.												

DATED December 5, 2012

/s/ Respondent Olympic Supply, Inc. d/b/a Onsite News By Counsel